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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARGARET PICUS, an individual; on behalf of herself and others similarly situated,, Plaintiffs, v. WAL-MART STORES, INC.; et al., Defendants.	Case No.: CV-5-00682-PMP-LRL JUDGE: Hon. Philip M. Pro Date: Time: Courtroom: Pretrial Conf. Date: Date First Paper Filed:

DEFENDANT MENU FOODS' RESPONSE TO PLAINTIFF'S OBJECTION TO EXHIBIT "A"

Defendant Menu Foods, Inc. ("Menu") responds to Plaintiff's Objection to Exhibit "A" (the "Objection") as follows:

Plaintiff's objections to Exhibit A, which is Defendant Menu's Press Release on the pet food recall (the "Recall"), should be overruled because the affidavit filed concurrently herewith authenticates Exhibit A. Moreover, the Recall is not extrinsic evidence and can be properly considered on a Rule 12(b) Motion to Dismiss because Plaintiff referenced the Recall in the

Complaint and the Recall is central to its claim that a single ingredient rendered the designation "Made in the U.S.A." deceptive. Finally, Exhibit A is directly relevant, as Plaintiff impliedly concedes and it is not hearsay.

I. BECAUSE EXHIBIT A HAS NOW BEEN AUTHENTICATED, PLAINTIFF'S CLAIM THAT EXHIBIT A IS UNAUTHENTICATED MUST BE OVERRULED.

Plaintiff objects to the admissibility of Exhibit A because, *inter alia*, Exhibit A is not authenticated. Objection 1. The affidavit of Lucinda Bach, filed concurrently herewith, authenticates Exhibit A pursuant to Federal Rule of Evidence 901. Therefore, Plaintiff's claim that Exhibit A is inadmissible for lack of authentication fails.

II. BECAUSE THE RECALL WAS REFERRED TO IN THE COMPLAINT AND IS CENTRAL TO ALL OF PLAINTIFF'S CLAIMS, THE COURT MAY CONSIDER THE RECALL ON THE MOTION TO DISMISS AND PLAINTIFF'S ARGUMENTS TO THE CONTRARY SHOULD BE REJECTED.

The court should reject Plaintiff's claim that the Recall cannot be considered on a Rule 12(b)(6) motion to dismiss. Certain written instruments attached to pleadings may be considered part of the pleading. *See* FED. R. CIV. P. 10(c). Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint. *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (citing numerous cases). "Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Venture Assoc. Corp. v. Zenith*, 987 F.2d 429, 431 (7th Cir. 1993). In this case, Plaintiff referred to the Recall in the Complaint. *See* Compl. ¶¶ 12, 44. The Recall is central to Plaintiff's claim that a single imported ingredient rendered the "Made in the U.S.A." label on the subject pet food deceptive. The Recall states that the pet food was manufactured in the U.S.A. The Recall also states that that the timing of the consumer complaints coincided with the introduction of an ingredient from a new supplier. The date the Recall was issued is also the date that Plaintiff set for when the true origin of the subject pet food was revealed for the first time. Compl. ¶ 39. Thus, because the Recall is referred to in the Complaint and is central to all of Plaintiff's claims, the Recall is considered part of the Complaint. Accordingly, the court can consider the Recall on the instant motion to dismiss.

Plaintiff cites *Marder* and *Erickson* for the proposition that the court may not consider the Recall as evidence on the disputed factual issue of whether Defendant Menu Foods "retained a benefit from the misrepresentation of geographic origin." Objection 1-2. However, both of these authorities recognize that, where as here, the document has been referred to in the complaint and is central to a plaintiff's claim such document may be properly considered part of the complaint. *Marder v. Lopez,* 450 F.3d 445, 448 (9th Cir. 2006); *Erickson v. Horing*, No. 99-1468 (JRT/FLN), 2000 U.S. Dist. Lexis 22452, at *31 (D. Minn Oct. 23, 2000).

Plaintiff also argues that the court cannot consider the Recall because it "is being used to contest the allegations of the pleading, which are assumed to be correct on a motion to dismiss." Objection 1. Plaintiff is simply wrong:

> Conclusory allegations and unwarranted deductions of fact are not admitted as true, [citation], especially when such conclusions are contradicted by facts disclosed by a document appended to the complaint. If the appended document, to be treated as part of the complaint for all purposes under Rule 10(c), Fed.R.Civ.P., reveals facts which foreclose recovery as a matter of law, dismissal is appropriate.

Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974) (holding that the investment prospectus was not misleading as a matter of law because it disclosed, contrary to plaintiffs' assertions, specific information relating to the sinking fund); *see Hamilton v. Scott*, 762 F. Supp. 794, 799 n.12 (N.D. Ill. 1991) (citing *Associated Builders* and holding that the rule on a 12(b)(6) motion to dismiss requiring the court to accept plaintiff's allegations as true inapplicable where the allegations are contradicted by documents attached to the complaint). In this case, the Recall was incorporated by reference into the Complaint as shown above. All of Plaintiff's claims are based on the allegedly deceptive "Made in the U.S.A." label on the subject pet food. The Recall clearly states that the subject pet food was manufactured at two of Menu Foods' United States Facilities. Therefore, there is nothing deceptive or misleading about the "Made in the U.S.A." label on the subject pet foods since the subject pet food was in fact made in the United States. Accordingly, Plaintiff's claims are foreclosed as a matter of law and dismissal of all claims is proper.

III. THE COMPLAINT RELIES ON THE RECALL AND PLAINTIFF ADMITS IN ITS OPPOSITION THAT EXHIBIT A IS RELEVANT TO ITS UNJUST ENRICHMENT CLAIM.

Under Federal Rule of Evidence 401, "Relevant evidence" means evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Plaintiff claims in her Objection that Exhibit A is irrelevant and, therefore, inadmissible under Federal Rule of Evidence 402. Objection 1.

However, Plaintiff's claim is contradicted by her own allegations in the Complaint, as well as by statements in her Opposition to Menu's Motion to Dismiss the Complaint. In the Complaint, Plaintiff raised the issue of the Recall twice. The first time, Plaintiff stated that the "2007 recall ... was ordered because of the presence of chemicals which were illegal for use in food in the United States." Compl. ¶ 12. The second time, Plaintiff stated that the concern over the use of illegal or banned chemicals or pesticides "is evidenced by the recall of [the subject pet food] which was ordered because the products were found to contain substances which are not approved for use in food products in the United States,..." Compl. ¶ 44. Plaintiff also raised the recall issue another time in connection with one of the other defendant's recalls. *See* Compl. ¶ 39 (discussing that Chemnutra admitted in its recall notices that certain components of the subject pet food was originally labeled as "Made in China.").

In the Opposition, Plaintiff states that Exhibit A is hearsay because it is being offered to "contest the allegations of the pleading ... The Complaint ... plainly alleges that Defendants retained the improper benefit. This important factual issue cannot be resolved by reference to a single hearsay piece of evidence..." Objection 1. Whether Defendant Menu retained any "improper benefit" tends to prove or disprove Plaintiff's claim for unjust enrichment. As such, the Recall is clearly relevant and the court should reject Plaintiff's claim to the contrary. The Recall is admissible evidence.

The Recall is also relevant because it tends to disprove the claim that the subject pet food was not "Made in the U.S.A., as discussed above.

IV. THE RECALL IS NOT HEARSAY.

Plaintiff claims the Recall is hearsay "as to the disputed issue of whether a benefit was retained." Objection 1. Hearsay" is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). A statement is not hearsay if it is "offered against a party and is the party's own statement in either an individual or a representative capacity." FED. R. EVID. 801(d)(2). In this case, Plaintiff sought to use the Recall against Defendant Menu in the Complaint by arguing that Menu recalled the subject pet food because of the presence of chemicals which were illegal or unapproved for use in food in the United States. Compl. ¶¶ 12, 44.

As pointed out in Menu's Memorandum in support of its Motion to Dismiss, where a defendant offers a document that has been referred to in plaintiff's complaint and is central to the his or her claim, the court treats such document as part of the complaint. *Ritchie*, 342 F.3d at 908; *Venture Assoc.*, 987 F.2d at 431; *Associated Builders*, 505 F.2d at 100. Therefore, the Recall was offered against Defendant Menu by Plaintiff. Further, because the Recall is Defendant Menu's own statement, the Recall is not hearsay but an admission. Accordingly, the court should overrule Plaintiff's hearsay objection.

V. CONCLUSION

For the reasons set forth above, Plaintiff's Objection to Exhibit A should be overruled.

Dated: July 27, 2007

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MARGARET PICUS, an individual; on behalf of herself and others similarly situated,,	Case No.: CV-5-00682-PMP-LRL
Plaintiffs,	JUDGE: Hon. Philip M. Pro
v.	Date: Time: Courtroom:
WAL-MART STORES, INC.; et al.,	
Defendants.	Pretrial Conf. Date: Complaint Filed: April 30, 2007

AFFIDAVIT OF LUCINDA J. BACH IN SUPPORT OF DEFENDANT MENU FOODS INC.'S RESPONSE TO OPPOSITION TO EXHIBIT "A"

I, Lucinda J. Bach, being over the age of eighteen, duly sworn and under oath, deposes and states as follows:

1. I am an attorney licensed to practice in the District of Columbia, and am a partner in law firm of DLA Piper US LLP, counsel for defendant Menu Foods, Inc. (hereinafter "Menu Foods"). This declaration is based upon my personal knowledge, except as to those matters stated on information and belief and, as to those matters, I believe them to be true. If called upon as a

witness, I would and could competently testify as to the facts set forth herein.

Attached hereto as Exhibit "A", which Menu Foods also submitted with its Motion to Dismiss, is a true and correct copy of Menu Foods' recall notice titled "Menu Foods Income Fund Announces Precautionary Dog and Cat Food Recall" (hereinafter the "Recall"). The Recall issued on or about March 16, 2007. On June 30, 2007, the Recall was printed from Menu Foods' website located at http://www.menufoods.com/recall/Press-Recall_03162007.htm for the purpose of attaching it to the Motion of Defendant Menu Foods, Inc. To Dismiss The Complaint filed with this court on July 5, 2007.

Sworn this 26th day of July, 2007 at Washington, District of Columbia under penalty of perjury under the laws of the District of Columbia .

Lucinda J. Bach

LUCINDA J. BACH

SUBSCRIBED AND SWORN TO BEFORE ME THIS 26th DAY OF JULY 2007.

Wendy Jo Scalley

Wendy Jo Scalley
Notary Public, District of Columbia
My Commission Expires 4-14-2010

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 26 day of July, 2007, a true and correct copy of the foregoing RESPONSE TO OBJECTION TO EXHIBIT "A" was served as follows:

( ) by placing same to be deposited for mailing in the U.S. Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, NV; and/or

( ) to be hand-delivered to the attorneys listed below at the address indicated below:

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